

Supreme Court of Texas
FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1304**

JOSEPH M. McADAMS, ET AL.,
Petitioners,

v.

GRIFFIN BELL,
In His Capacity as Attorney General
of the United States, ET AL.,
Respondent(s).

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOSEPH M. McADAMS
MUNICIPAL COURT JUDGE
PETITIONER IN PRO SE
P.O. Box 1091
City of Anthony
Anthony, Texas 88021
(915) 886-2314

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No.

JOSEPH M. McADAMS, ET AL,
Petitioners

v.

GRIFFIN BELL,
In His Capacity as Attorney General
of the United States, ET AL,
Respondent(s).

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

COMES NOW the Petitioners, in pro se, and respectfully
pray that this Court issues a writ of certiorari to review a
judgment of the United States Court of Appeals for the Fifth
Circuit and in support of this petition show the Court:

OPINION BELOW

The Court of Appeals delivered a per curiam opinion un-
published, on November 16, 1977, copy of which is attached as
Appendix A. Motion for Rehearing was as per curiam opinion

denied on December 12, 1977, also unpublished, copy of which is attached as Appendix B.

JURISDICTION

Review is sought of the judgment of the Court of Appeals, dated November 16, 1977, rehearing having been denied by said Court on December 12, 1977.

Jurisdiction to review the judgment in question is conferred on this Court by Title 28, U.S.C., S 1254(1).

QUESTIONS PRESENTED

1. Whether a decision rendered by the Commissioners of the U.S. Civil Service Commission under 5 CFR S 713.235 constitutes "final action" taken by the Civil Service Commission pursuant to 42 U.S.C., S 2000e-16(c), and, if so, whether Petitioners are entitled to a trial de novo?

STATUTORY AND AGENCY REGULATORY PROVISIONS INVOLVED

Title 42, United States Code, Section 2000e-16(c):

Within thirty days of receipt of notice of final action taken . . . by the Civil Service Commission upon an appeal from a decision or order of such department, . . ., on a complaint of discrimination based on race, . . ., or national origin, brought pursuant to subsection (a) of this section, . . ., an employee . . ., if aggrieved

by the final disposition of his complaint, . . ., may file a civil action as provided in section 2000e-5 of this title,

Title 5, Code of Federal Regulations, Section 713.234:

. . ., but shall contain a notice of right to file a civil action in accordance with section 713.282.

Title 5, Code of Federal Regulations, Section 713.235:

Review by the Commissioners. (a) The Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits argument or evidence which tends to establish that:

- (1) New and material evidence
- (2) The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or
- (3) The previous decision is of precedential nature . . . as to merit the personal attention of the Commissioners.

Title 5, Code of Federal Regulations, Section 713.282:

Notice of right. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under 713.234.

STATEMENT OF THE CASE

This petition arises out of the dismissal of an EEO complaint, *McAdams, et al, v. Levi*, EP-76-CA-5, filed in the United States District Court for the Western District of Texas, El Paso Division, pursuant to 42 U.S.C., S 2000e-16(c). The complaint in the instant case listed with particularity the step-by-step exhaustion of administrative remedies available under 5 CFR S 713.211 et seq., promulgated by the U.S. Civil Service Commission in compliance with 42 U.S.C., S 2000e-16(b). (R, Vol. I, Exhibits 8-13, and 16).

On December 8, 1975, the Civil Service Commission rendered its final decision under 5 CFR S 713.235, Review by the Commissioners. The decision was received by Petitioner on December 13, 1975.

On January 12, 1976, the complaint was filed in District Court. Respondent(s) First Motion to Dismiss was filed on May 19, 1976, requesting "the Court to dismiss the complaint herein for reasons that it shows on its face failure to comply with the time limitation of 42 U.S.C., S 2000e-16." (R, Vol. I, 12). In his Brief in Support of Motion to Dismiss, submitted September 24, 1976, Respondent(s) presented the following issue in District Court:

"The issue raised by the Motion to Dismiss is whether the Plaintiff has complied with the 30-Day filing requirement in 42 U.S.C., S 2000e-16(c). The real issue raised by the foregoing fact is what constitutes the "final action taken" by the Civil Service Commission." (R, Vol. I, 20).

On October 4, 1976, Petitioners filed their Response to the above Brief, which stated in relevant part:

"The main thrust of defendants Motion to Dismiss now appears to be whether or not plaintiffs

have a legal right to pursue all the administrative remedies allowable under 5 CFR S 713.231, et seq., promulgated by the Civil Service Commission in compliance with 42 U.S.C., S 2000e-16(b)." (R, Vol. I, 21).

On October 6, 1976, a hearing was held in District Court, wherein the complaint was dismissed purportedly for failure to comply with the 30-day time limitation embodied in 42 U.S.C., S 2000e-16(c). The Order of Dismissal was entered on December 6, 1976. (R, Vol. I, 22). On December 14, 1976, a Motion to Reconsider, Alter, and Amend Judgment was filed by Petitioners. (R, Vol. I, 23). It was denied by the District Court on February 28, 1977. (R, Vol. I, 26). On March 23, 1977, a Motion for Relief from Order was filed in the El Paso District Court addressed to Chief Judge Spears, Western District of Texas, wherein Petitioners claimed full compliance with the requirements of 42 U.S.C., S 2000e-16(c). (R, Vol. I, 27). Judge Spears denied the Motion on March 28, 1977. (R, Vol. I, 28). The same Motion was denied by the District Court on April 6, 1977. (R, Vol. I, 29).

Although there are numerous other legal issues involved in the instant case, in the interest of judicial expediency, Petitioners wish to pursue only those issues dealing with their discrimination claim under the EEO Act of 1972.

REASONS FOR GRANTING WRIT

1. Final review by the Commissioners under 5 CFR S 713.235 is the "final action" contemplated by 42 U.S.C., S 2000e-16(c) from which appeal to the District Court may be taken.

The decision rendered by the Appeals Review Board of the Civil Service Commission under the provisions of 5 CFR S 713.234, dated August 29, 1975, stated in its conclusion:

"... However, if you are not satisfied with this decision, you are authorized by section 717(c) of the Civil Rights Act of 1964, as amended on March 24, 1972, to file civil action in an appropriate U.S. District Court within thirty (30) calender days of your receipt of this decision." (Copy of the Board's decision is attached as Appendix C).

Thus, had Petitioners filed suit within 30-days of receipt of the above decision, the complaint would have been properly before the District Court. 42 U.S.C., S 2000e-16(c) and *McCall v. Brooks*, 432 F. Supp. 640, footnote 5, (E.D. Penn. 1977). Subsequently, they would have been entitled to a trial de novo on all issues of their employment discrimination claims. *Chandler v. Roudebush*, 425 U.S. 840, 96 S. Ct. 1949, 48 L.Ed.2d. 416, 422 (1976).

Instead of filing civil suit, on September 9, 1975, an appeal was submitted to the Commissioners of the Civil Service Commission under 5 CFR S 713.235, which exhausted the last available administrative remedy within the Commission's EEO regulations, and tolled the 30-day statute of limitation requirement in 42 U.S.C., S 2000e-16(c). Cf., *McKart v. U.S.*, 395 U.S. 185, 193-95 (1969). The appeal was received by the Commissioners on September 12, 1975, or within fifteen (15) calender days from the Appeals Board's decision. Copy of the U.S. Mail Return Receipt Requested is attached as Appendix D. The Commissioners acknowledged receipt of the appeal on September 25, 1975, wherein they noted in relevant part:

"We have a substantial number of cases on hand and each case must be reviewed carefully. As soon as a decision has been made as to whether your case may be reopened, we will write to

you." (R, Vol. I, Exhibit 13).

On December 8, 1975, the Commissioners rendered their final decision for the Civil Service Commission, which stated in its conclusion:

"Having received the final decision of the Civil Service Commission on your appeal, you have exhausted your administrative appeal rights within the Commission and your case is considered to be closed." (Copy of the Commissioners' decision is attached as Appendix E).

This notice of "final action" taken by the Civil Service Commission was received by Petitioners on December 13, 1975, via First Class Mail. The instant case was filed in District Court on January 12, 1976, which is clearly within 30-days of receipt of the Commissioners' final decision. *Brown v. GSA*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d. 402, 404 (1976). It should be noted by this Court that even if Petitioners had received the Commissioners' decision on December 11, 1975, or within three (3) calender days, the complaint would have been properly and timely filed in District Court, because January 12, 1976, fell on a Monday. *Haire v. Calloway*, 385 F. Supp. 309 (E.D. Missouri 1974). It is therefore Petitioners contention that they have fully complied with the 30-day time limitation requirement in 42 U.S.C., S 2000e-16(c).

The Commissioners of the Civil Service Commission are not under any regulatory obligation to render "notice of right" to file suit in District Court within 30-days of receipt of their decision under 5 CFR S 713.235 or 713.282. Cf., *Allen v. U.S.*, 542 F.2d. 176, 179-80 (CA 3 1976). That right, however, is conferred on a federal employee under 'Right to File Civil Action', 5 CFR S 713.281, *Statutory*

right, which states in relevant part:

"An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States District Court within:

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint."

The language utilized by the Commissioners in the conclusion of their decision rendered December 8, 1975, which states in pertinent part:

"Having received the final decision of the Civil Service Commission on your appeal,
",

resembles the statutory language employed in 42 U.S.C., S 2000e-16(c) regarding the 30-day time limitation requirement to file suit and obviously meets the requirement of the above cited regulation. "42 U.S.C., S 2000e-16(c) does not require the Civil Service Commission to notify federal employees of their right to sue; it is only required to notify them of any final action taken on their complaint." *Eastland v. Tennessee Valley Authority*, 533 F.2d. 364, 369 (CA 5 1977). It is well settled that if an EEO complainant "does appeal to the Commission, he may file suit within 30 days of the Commission's final decision." *Brown v. GSA*, *supra*, at 411. "The term 'notice', no less than the phrase 'may file a civil action', requires an interpretation animated by the broad humanitarian and remedial purpose underlying the federal proscription of employment discrimination". *Coles v. Penny*, 531 F.2d. 609 (D.C. Cir. 1976).

The District Court, in its Order of Dismissal, found "that plaintiffs have failed to meet the requirement of 42 U.S.C., S 2000 (e) - 16 (c)". Copy of the Dismissal Order is attached as Appendix F. This is a patently untenable legal conclusion, for within 30-days of receipt of notice of "final action taken" by the Commissioners of the Civil Service Commission under 5 CFR S 713.235, Petitioners filed civil action in District Court. The question of timeliness of the administrative appeal(s) was not reached or decided by the District Court. The record herein affirmatively demonstrates that Petitioner, in reliance of Civil Service Commission EEO Regulations, timely appealed his case to the Commissioners of the Civil Service Commission pursuant to 5 CFR S 713.235, and within 30-days of receipt of their decision filed a civil action in District Court in full compliance with the requirements of 42 U.S.C., S 2000e-16(c). Therefore, the dismissal by the District Court in the instant case was clearly erroneous.

This Court should be mindful that "Title VII of the Civil Rights Act of 1964 is remedial in character and should be liberally construed to achieve its purpose." *Bell v. Brown*, 557 F.2d. 849 (D.C. Cir. 1977).

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the instant case should be remanded to District Court for a trial de novo on all issues of their employment discrimination claims, including the question of timeliness of the administrative appeal(s), under the mandate of *Chandler v. Roudebush*, *supra*.

Therefore, Petitioners respectfully request that a writ of certiorari be granted and the judgment of the United States

Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted:

March 9, 1978

s/JOSEPH M. McADAMS
Municipal Court Judge
Petitioner in Pro Se
P.O. Box 1091
City of Anthony
Anthony, Texas 88021
(915) 886-2314

CERTIFICATE OF SERVICE

I hereby certify that I have served the below named parties by placing in the U.S. Mails, at the U.S. Post Office, Anthony, Texas, certified, return receipt requested, and air mail postage prepaid, three (3) copies of this Petition for Certiorari addressed to their proper addresses on March 9, 1978.

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Mr. Jamie C. Boyd
United States District Attorney
Western District of Texas
U.S. Courthouse
655 E. Durango Blvd., Suite G-13
San Antonio, Texas 78206

s/JOSEPH M. McADAMS
Petitioner in Pro Se

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-3158
Summary Calendar*

JOSEPH M. McADAMS,
Plaintiff-Appellant,

v.

NORMAN A. CARLSON, Director,
U.S. Bureau of Prisons,
Defendant-Appellee.

No. 77-2028
Summary Calendar*

JOSEPH M. McADAMS, et al.,
Plaintiffs-Appellants,

v.

GRIFFIN BELL, in his capacity as
Attorney General of the United States,
Defendant-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(November 16, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.¹

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F. 2d 409, Part I.

¹See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F. 2d 966.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3158

JOSEPH M. McADAMS,
Plaintiff-Appellant,

v.

NORMAN A. CARLSON, Director,
U.S. Bureau of Prisons,
Defendant-Appellee.

No. 77-2028

JOSEPH M. McADAMS, et al.,
Plaintiffs-Appellants,

v.

GRIFFIN BELL, in his capacity as
Attorney General of the United States,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

ON PETITION FOR HEARING

(December 12, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

IT ISO ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the same is hereby
DENIED.

ENTERED FOR THE COURT:

/s/ Robert A. Ainsworth, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
WASHINGTON, D.C. 20415

IN REPLY PLEASE
REFER TO
ARB:yrj
August 29, 1975
YOUR REFERENCE

REGISTERED MAIL-RETURN RECEIPT REQUESTED

Mr. Joseph M. McAdams
P.O. Box 1091
Anthony, Texas 88021

Before: Jeffries, McDonald and
Stanislav, Board Members.

Dear Mr. McAdams:

This is in reference to your appeal dated May 30, 1975, from the March 31, 1975 decision of the U.S. Department of Justice on your complaint of discrimination because of race and/or national origin (Puerto Rican) which you filed in connection with your employment at the Bureau of Prisons at the La Tuna Federal Correctional Institution in Texas.

Since your appeal was dated May 30, 1975, two months after the date of the decision, you were requested by Board letter dated July 23, 1975, to furnish any representations that would tend to establish that the time limit of 15 calendar days should be waived so that your appeal could be accepted by the Appeals Review Board for adjudication. The Board's letter explained that a waiver might be granted upon a showing that you were prevented by circumstances beyond your control from filing in a timely fashion.

In your letter dated July 31, 1975, you stated that you did not receive the Transcript of Proceedings until about April 14, 1975, and you reiterated your statements, made in your

original letter of appeal, that you wrote to the Department on April 18, 1975, requesting that it forward certain documents so that *you could determine whether or not to appeal*. You stated that you received these documents on May 12, 1975, and you presented a doctor's statement indicating that you were ill and not at work from May 9 through May 29, 1975. On that basis, you request that the Board accept your appeal even though you did not submit it within the required fifteen day time limit.

On the basis of the above information, the Board concludes that these facts do not establish circumstances beyond your control that prevented you from filing an appeal within the prescribed fifteen calendar days. The agency's decision was dated March 31, 1975. It clearly advised you of the 15 day time limit. You state that you wrote to your agency on April 18, 1975, and received the requested information on May 12, 1975. *The Board notes that your receipt of the transcript and your request for and receipt of the other documents did not in any way prevent you from filing an appeal.* The agency decision clearly advised you that you had fifteen days from your receipt of the decision, not of the transcript or other information, in which to decide to appeal. *An appeal is made from the agency decision, not from any other information.* Even if the Board were to consider *the May 12 date*, you still did not appeal until May 30, more than 15 days thereafter. The fact that you were on sick leave does not, of itself, excuse you from the applicable time limit and you have presented no information which would establish that you were so disabled that you were unable to file a *notice of appeal*.

In the Board's judgment, you could have submitted a *notice of appeal* within the correct time limits and there were no circumstances beyond your control which warrant waiving the time limit in your case. Therefore, the Board declines to accept your letter of May 30, 1975, as an appeal from

your agency's final decision of March 31, 1975, because your appeal was untimely filed.

Civil Service regulations provide that decisions of the Board are final (and that there is no further right of administrative appeal). However, if you are not satisfied with this decision, you are authorized by section 717(c) of the Civil Rights Act of 1964, as amended on March 24, 1972, to file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of your receipt of this decision.

For the Board:

Sincerely yours,

Herman D. Staiman
Chairman

cc: Clair A. Cripe
EEO Officer
U.S. Department of Justice
Bureau of Prisons
Washington, D.C. 20537

cc: Department of Prisons
Department of Justice
La Tuna Federal Correctional Institution
Anthony, Texas 88021

APPENDIX D

PS Form 3811, Nov. 1973

● SENDER: Complete this form and add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one):

- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery..... 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery..... 85¢

2. ARTICLE ADDRESSED TO:
Honorable Robert E. Namph

3. ARTICLE DESCRIPTION:
REGISTERED NO. 808195 CERTIFIED NO. 151010
(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE

4. DATE OF DELIVERY

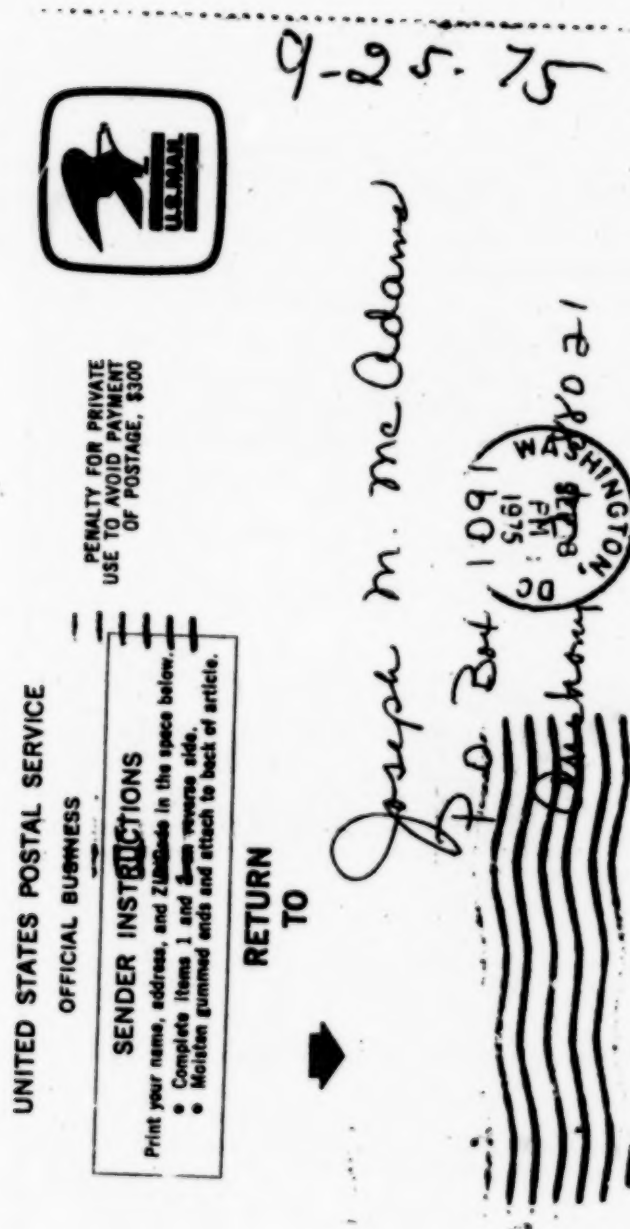
5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

POSTMARK

CLERK'S INITIALS

BEST COPY AVAILABLE



APPENDIX E

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415
December 8, 1975

IN REPLY PLEASE
REFER TO
YOUR REFERENCE

Mr. Joseph M. McAdams
P.O. Box 1091
Anthony, Texas 88021

Dear Mr. McAdams:

This is in further response to your letter of September 9, 1975, addressed to Chairman Robert E. Hampton, requesting the Commissioners of the Civil Service Commission to reopen and reconsider your appeal case which was decided by the Commission's Appeals Review Board on August 29, 1975. This is also in further response to your letter of September 15, 1975, with attachments, addressed to the Honorable John H. Powell, Jr., Chairman, EEOC, which was forwarded to this office for consideration in connection with your request to have your case reopened.

Decisions of the Commission's Appeals Review Board are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However, it has been provided by regulation that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

- (a) New and material evidence is available that was not readily available when the previous decision was issued;
- (b) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(c) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

The file shows that your appeal was rejected by the Appeals Review Board because it was not filed within the prescribed 15-day time limit for filing an appeal. The issue of timeliness was therefore the only issue considered by the Appeals Review Board in rejecting your appeal.

We have carefully considered the information submitted in support of your request to have your case reopened. We find that your submission contains no new material evidence not readily available at the time of the decision of the Appeals Review Board sufficient to indicate that you were prevented by circumstances beyond your control from filing a timely appeal or which would indicate error in the finding of the Appeals Review Board that your appeal was not timely filed. In the absence of any such new evidence or information which otherwise meets any of the above criteria for reopening a previous decision of the Appeals Review Board, the request to reopen your case must be denied.

Having received a final decision of the Civil Service Commission on your appeal, you have exhausted your administrative appeal rights within the Commission and your case is considered to be closed.

I regret that the reply could not be favorable.

For the Commissioners:

Sincerely yours,

Robert B. Bates

Assistant to the Commissioners (Appeals)

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

JOSEPH M. McADAMS, ET AL.)

V.)

EP-76-CA-5

EDWARD H. LEVI, ET AL.)

ORDER

On this the 6th day of December, 1976, came on to be considered Defendant's Motion to Dismiss. After carefully considering the motion and the Brief in support thereof along with the plaintiffs' response and Brief as well as the oral argument of the parties, the Court is of the opinion that plaintiffs have failed to meet the requirements of 42 U.S.C., Section 2000 (e) - 16 (c).

Accordingly, Defendant's Motion to Dismiss should be, and the same is hereby, in all things GRANTED and this action is hereby dismissed. Costs shall be assessed against plaintiff.

ORDERED AND ENTERED this 6th day of December, 1976.

JOHN H. WOOD, JR.

UNITED STATES DISTRICT JUDGE